Supreme Court of the United States

October Term, 1964

No. 486

W. Palmer Dixon, Joan Dixon, Everett W. Cady, Clarissa H. Cady, J. Herbert Higgins, Marion Blair Higgins, Stephen A. Koshland, Carol F. Koshland, Henry A. Loeb, John L. Loeb, Carl M. Loeb, Jr., and Margaret L. Kempner, as Executors of the Last Will and Testament of Carl M. Loeb, Sr., Deceased, Henry A. Loeb, John L. Loeb, Carl M. Loeb, Jr., and Alan H. Kempner, as Executors of the Last Will and Testament of Adeline M. Loeb, Deceased, John L. Loeb, Frances L. Loeb, Henry A. Loeb, Louise S. Loeb, Clifford W. Michel, Barbara R. Michel, Mark J. Millard, Claire Millard, Henry Parish, 2nd, Dorothy Parish, Hubert R. A. Simon, Samuel L. Stedman and Gerda C. Stedman,

Petitioners,

against

The United States of America,

Respondent.

REPLY BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bernard E. Brandes,
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Of Counsel:
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Introduction

The Government in its brief (Br. 4)* states that it has not repeated its principal argument on the issue common to this case and to the companion case of *United States* v. *Midland-Ross Corporation*, No. 628. This argument has already been answered by the brief for the taxpayer in

* All "Br." references are to the Government's brief in this case.

that case. This reply brief will accordingly be confined to the Government's responses to petitioners' argument.

For convenience, since the Government has numbered as "I" its answer to petitioners' "Point II", we shall reply first to the Government's "I" and then to the Government's "II."

POINT I

Because of the circumstances of this case, the Government's retroactive and discriminatory application of its change of position as regards discount should not be upheld.

1. Petitioners do not maintain that all changes of position by the Government "must always be given only prospective effect" (Br. 7). It is petitioners' position based on *Automobile Club of Michigan* v. *Commissioner*, 353 U. S. 180 (1957) that *circumstances* can exist which make retroactive application of change of position an abuse of power.[1]

Retroactive application of a change of position was more clearly justified by the circumstances in *Automobile Club of Michigan*. Yet this Court found it necessary to examine the circumstances before it could uphold the Government's use of power. Nevertheless, in this case the Government arbitrarily argues (Br. 7) without authority that no such examination need now be made. No attempt is made to show that the retroactive change of position as regards issue discount was properly applied.

The examination of the circumstances in this case will show that the Government's change of position cannot be

[1] *Schuster* v. *Commissioner*, 312 F. 2d 311 (9th Cir., 1962); *Lesavoy Foundation* v. *Commissioner*, 238 F. 2d 589 (3rd Cir., 1956); *Brecklein* v. *Bookwalter*, 231 F. Supp. 404 (D. C. Mo. 1964) (Appeal pending 8th Cir.).

upheld because (a) the change of position was retroactively applied without warning despite reliance on the prior position,[2] and (b) such retroactive application was not on a uniform basis and petitioners were discriminated against without reason.

2. The Government also argues that petitioners were not entitled to rely on the *Caulkins* Acquiescence [3] even if such reliance might otherwise bar retroactive application of a change of a position under the circumstances and in the manner here present (Br. 7). Two reasons are alleged.

(a) The Government argues, in *Caulkins* [4] the taxable event was a retirement, whereas here the taxable event was the accrual of the discount as required by the Government. And the Government maintains even *Midland-Ross* is closer to *Caulkins* because in *Midland-Ross* the taxable event was "treated" as being the sale of the debt obligation (Br. 8).

It is true that on audit of the Midland-Ross Corporation, an accrual basis taxpayer, the Government accepted the sale as the taxable event, whereas on audit of the partnership (in which petitioners were members), also an accrual basis entity, the Government required that the issue dis-

[2] The Government cites (Br. 5, n. 4) as authority for its position in this case Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 Tax L. Rev. 487. In this same article it is pointed out (p. 509) that the Commissioner admitted in *Automobile Club of Michigan* that he may be deemed to have abused his discretion depending on the circumstances and that had the attempt been made to apply the change of position to years prior to 1943, the year in which the change of position was announced, taxpayer's contentions and cases cited in support might apply. In this case the change of position first indicated in 1953 and made final in 1955 is being applied to 1952.

[3] 1944 Cum. Bull. 5.

[4] *Caulkins* v. *Commissioner*, 1 T. C. 656, aff'd 144 F. 2d 482.

count be accrued.[5] This difference in audit treatment as between two accrual basis entities can have no relevance to the issue. It has been conceded that the securities in this case, as in *Midland-Ross* were sold prior to maturity in bona fide sales. The issue before the Court in both cases must therefore be the same. Moreover, as is pointed out in the brief for taxpayer in *Midland-Ross* (Br. 27-32) there is no basis for requiring accrual of discount.

The Government has in its argument about accrual assumed the conclusion to the issue before the Court (Br. 8-9). It cannot be that because the Government has erroneously required the accrual of discount on the ground that it was in the nature of interest, the issue here could be anything other than the status under the 1939 Code of discount when realized by sale or exchange. Surely, the Government cannot believe that the capital gain status of issue discount under the 1939 Code could conceivably depend on whether the taxpayer was on the cash or accrual basis. Gain attributable to capital appreciation is reportable by cash or accrual basis taxpayers alike only after realization by sale or other disposition. The Government's statement that petitioners are misstating the issue (Br. 9) is patently diversionary.

(b) The basic fallacy of the Government's interpretation of *Caulkins* and therefore its contention that the Acquiescence should not have been relied on (Br. 7-8) is developed in the brief for taxpayer in *Midland-Ross* (pp. 22-24). We need here make only two additional observations.

In the Revenue Ruling which withdrew the *Caulkins* Acquiescence retroactively except as to Accumulative In-

[5] In its brief in *Midland-Ross* (p. 3) and in its brief on petition for certiorari in this case (p. 7, n. 5), the Government admits that there could have been no basis for the distinction in treatment of the Midland-Ross Corporation but justifies the result on the ground that the difference in tax consequence had the Midland-Ross Corporation been treated in the same fashion as the partnership would have been "negligible."

stallment Certificates it is stated that there can be no basis for distinguishing the discount element and the tax treatment thereof in *Caulkins* from discount in any other oblitigation.[6] Accordingly, at all times the only issue concerned the status of issue discount.

Second, the Circuit Court in *Caulkins* pointed out that "because of the application of the capital gains tax to securities which on their retirement may not result in capital gain, inconsistencies and inequalities may well result from the application of Section 117(f)." 144 F. 2d at 484. The securities to which the Court referred were necessarily those (like the securities here involved) which were not in registered form or with interest coupons attached and which would therefore under the 1939 Code not be regarded as "exchanged" and therefore not eligible for capital gains treatment on their retirement. Since capital gains treatment could be applicable only if such securities were sold, the Court clearly recognized that sale before retirement of discount securities resulted in capital gains treatment and its decision therefore was not confined to the situation where discount was realized on retirement pursuant to Section 117(f).

The issue in *Caulkins* was accordingly identical with the issue in this case. Therefore, petitioners were privileged to rely upon the *Caulkins* Acquiescence in view of the identity of issue. Such reliance was invited by the statement in the Cumulative Bulletin quoted in petitioners' brief (p. 30).[7]

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[6] Rev. Rul. 55-136, 1955-1 Cum. Bull. 213, 214.

[7] The Government quotes from the introduction to the Cumulative Bulletin in 1944 to show "an express disclaimer" and therefore no basis for a claim of reliance (Br. 7). The Government neglects to quote the separate and special statement (quoted by petitioners) which is confined to Acquiescences and which appears in both the 1944 and 1952 Cumulative Bulletins.

POINT II

Analysis of legislative history and precedent in this Court supports petitioners' contention that prior to the 1954 Code original issue discount on private securities was a capital item.

1. The 1929 Senate Debate in connection with an amendment to the Second Liberty Bond Act supports petitioners' construction of the 1939 Code.[8] The debate and the legislation which followed showed that the Senate accepted the tax status of issue discount as capital gain despite its relationship to compensation for the use of money and found it necessary specifically to characterize the issue discount on the newly-authorized Treasury Bills as "interest" in order to make applicable the tax exemption for "interest."

The debate is reproduced in detail in the appendix to taxpayer's brief in *Midland-Ross* (pp. 11a-33a).[9] For the convenience of the Court references to debate hereafter set forth are to the appropriate pages of that appendix rather than to the Congressional Record.[10]

The debate evidences the following:

(a) The amendment authorized the issue of Certificates of Indebtedness at not less than par and to carry interest

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[8] The only Court which in considering the issue analyzed the 1929 Debate was the District Court in *Midland-Ross* (214 F. Supp. 631). Judge Kalbfleisch (214 F. Supp. at 637) found the demonstrated Congressional understanding of discount as a capital item and the need for legislation to provide otherwise most persuasive.

[9] The more relevant portions of the debate are found in pages 20a-33a.

[10] Several senators participated in the debate. However, those whose statements bear the closest reading are Senators Smoot, Couzens and Reed. They were the only members of the Senate Finance Committee to participate and displayed the most understanding of the then tax law and practice.

and Treasury Bills to be issued on a discount basis and without interest (p. 12a). In Section (b) of the amendment it was provided that all such Certificates and Bills shall be exempt both as to principal and interest and that any gain from the sale or other disposition thereof shall be exempt from tax (p. 13a). Since the Certificates and not the Bills were to be issued with interest, the exemption for interest could apply only to the Certificates. The provision with regard to gain on sale was designed for the Bills since the discount at which they were being issued would inevitably result in a gain on sale.[11]

(b) It was acknowledged that for the Bills to be saleable it would be desirable to provide tax exemption comparable to that being concurrently continued for interest. The Treasury had proposed, and the Senate Finance Committee had accepted capital gains tax exemption for the Bills as their solution for the problem of providing the tax exemption.[12]

(c) The Senate realized that the provisions of the statute exempting from tax interest on United States obli-

[11] Senator Reed (28a):

"It is to prevent that discount being taxable that the words were inserted on page 3 which the Senator from Michigan is now trying to strike out."

[12] Senator Smoot (16a):

"The Senator will admit, will he not, that if the bills were exempt so far as capital-gains taxation is concerned, the Government could purchase the money through these bills a little cheaper than it otherwise could?"

Senator Smoot (17a):

". . . They [the Bills] will be sold in the open market, as I have already stated, and the Treasury Department thinks at least—and I rather agree with them—that with this provision in the bill they may be able to obtain money for the short periods of time desired at a little less rate and perhaps make more than would be gained by taxing capital gains which might accrue upon the bills."

gations would not protect as against tax the realization of the discount at which the Bills would be issued.[13] The Senate based this conclusion upon its understanding that under existing law issue discount realized on sale was taxable as capital gain and not as interest—and it is clear that the Treasury was in accord.[14] Since discount was not "interest" it would not be exempt from tax without specific legislation.

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[13] Senator Smoot (30a):

"Mr. President, the theory of the bill is that if the bills are tax exempt, the Government of the United States can make more out of their sale because of a lesser rate of interest than it can by taxing capital gain if a profit should be made. No interest is involved in it at all; there is no interest to be collecte on the bills; they are sold without interest; and the Secretar of the Treasury believes that with the words which have been referred to in the bill the Government will get more for the securities than if it imposed a tax upon whatever the interest might be."

[14] Senator Couzens (25a-26a):

"Mr. President, I wish to answer the Senator from Pennsylvania [Mr. Reed]. He is a very plausible debater, and what he says is substantially correct, except that to eliminate this provision would not defeat the purposes of the Treasury Department. All of the advantages that the Treasury Department would get under this proposed law will still be retained, even with the amendment which I propose, except a possible slight difference in the interest rate because of the fact that the banks may have to pay on the capital gain but that is all problematical. The Undersecretary of the Treasury stated before the Finance Committee that the same identical bills of indebtedness, when traded in commerce, are subject to a profit tax. When a bill is traded in commerce, an acceptance, or what not, if there is a capital gain, it is taxed. There is no difference whatever. Whether or not we take the money out of one pocket and put it into the other, the fact is that if we shall adopt the principle of exempting securities from the capital-gain tax we shall establish a principle which will return to plague us so long as we have the capital-gain tax on the statute books."

Senator Smoot (30a) note 13, *supra*.

This result was accepted with full awareness of the relationship between discount and compensation for the use of money and that in business thinking the discount was similar to interest.[15] When Senator Walsh of Montana

[15] Senator Reed (23a):

". . . There is an apparent capital gain when a bank buys a 30-day note at a discount, but actually that capital gain represents the hire of the money for the interval that elapses between the purchase and the maturity date."

Senator Reed (24a):

"Precisely; and there the Senator puts his finger on the difference. If there is a capital gain in a transaction involving a 4¼% per cent Liberty bond, that is a true capital gain, and it is not interest. The coupon represents the interest on that investment. These certificates are to have no coupons, and ordinarily the capital gain in the five or six weeks that they would be held would represent the interest. It is the hire for the use of the money."

Senator Reed (24a-25a):

". . . This would be the practical effect of the amendment: I personally do not care a rap whether the tax-exempt feature remains in the bill or not; but if we are going to make interest on Treasury certificates tax exempt—and that is what we have [p. 2330] done, because no corporation pays a penny of tax on certificate coupons—then there is no sense in providing for Treasury bills at all. If a corporation knows that it is going to have to pay a tax on the amount of the discount at which it purchases the Treasury bills under par—whether we regard it as a capital gain, as my friend from Michigan does, or whether we regard it as the hire of the money, as I do, does not make a particle of difference—no bank is going to buy Treasury bills on the same interest basis on which it will buy Treasury certificates, because one is free from tax and the other is subject to 11 per cent tax on all that gain. So there would be no use of initiating the system of Treasury bills if we are going to tax the fractional appreciation in the value. Banks will not buy them or else they will buy them at a discount, which is that much greater, so as to take care of the tax. We are just beating the devil around the bush if we try to make that fraction taxable because we have to pay it to the bank, and then we go and tax the bank and get it back to ourselves. We had better get the advantage of the lower discount rate."

suggested that the discount might be regarded like interest and the exemption for interest might apply because in the words of Senator Reed it represented "hire of the money" (p. 25a), Senator Reed replied (p. 29a): "That is the business way of doing it; *but under the present regulations of the Bureau of Internal Revenue the whole amount would be considered to be capital gain.*" (Emphasis added.)

(d) The objectors, led by Senator Couzens, were against any exemption from capital gains tax on the ground that an undesirable principle would thereby be established which might lead to exemption from tax of all capital gains.[16] Another solution to the problem became indicated.

(e) Discussion between Senator Couzens and Senator Reed developed the relationship of issue discount to compensation for the use of money despite the taxation thereof as a capital gain.[17] Since capital gains on other U. S. securities were subject to tax, there was reason to conclude that only the issue discount need be exempted from tax to make the Bills saleable.[18] It then became apparent that

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[16] Senator Couzens (22a):

"If that entering wedge is permitted to become effective to exempt any form of security from capital-gains tax, every Senator knows that it will be used as an argument by every agency that desires a repeal of the capital-gain tax."

[17] Senator Reed (23a):

". . . There is an apparent capital gain when a bank buys a 30-day note at a discount, but actually that capital gain represents the hire of the money for the interval that elapses between the purchase and the maturity date."

Senator Couzens (24a):

"I say the statement [Senator Reed (24a) note 15, *supra*] is misleading because it is not all interest. It depends upon the time that elapses between the issuance of the security and the date of maturity."

[18] Senator Couzens (24a):

"We are not discussing interest. We are discussing capital gain. The inference goes out that the bonds are not taxable in the hands of corporations. I contend that if there is a capital gain, they are taxable in the hands of a corporation."

the problem could be handled by making the discount which could always be identified, exempt from tax through labeling it "interest." [19] The suggested exemption from capital

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"Before the Senator proceeds further, I want to correct him in one respect. The Senator creates the impression that there can be no capital gain because it is all interest. If I buy one of those bills due September 1, 1929, and I buy it at 98 and sell it to-morrow at 99, there is a capital gain not represented by the interest to which the Senator has referred."

Senator Reed (24a).

"Of course there is"

Senator Couzens (31a):

"That is the simple way of putting it. In other words, if the Government sells the certificate to one individual on a 4 per cent basis, and he turns around and sells it on a 3 per cent or 2 per cent basis, the difference is profit."

[19] Senator Reed (31a):

"Mr. Reed. Mr. President, it seems to me these questions have brought the issue down to the real point. What actually happens in the case of the transaction described by the Senator from Montana is that a negotiable instrument is bought at one price, and subsequently sold at another; and the profit, taken in connection with the time the bill is held, is a capital gain which is the equivalent of interest on that money.

Mr. Couzens. Oh, no!

Mr. Reed. It is just a matter of definition. Please indulge me until I finish the thought. Now, if we can agree that the amount of the discount at which the bill was originally sold shall be considered as interest, and that that shall be nontaxable, while at the same time any transactions relating in capital gains pending the maturity of the certificate should be taxed, I think we should all be agreed on the situation. *All the Treasury wants is to make that which is in good faith the equivalent of interest tax free, as it is to-day on Treasury certificates*; and I understand that the Senator has no objection to that.

Mr. Walsh of Montana. Not at all. We are agreed about what ought to be done. It is simply a question as to the language in which our views ought to be expressed.

Mr. Reed. It is merely a matter of expressing that thought clearly; and we ought to be able to agree on that." (emphasis added)

gains tax was removed and there was substituted a provision which characterized the issue discount on the Bills as "interest"[20] Since interest on United States obligations was under the statute exempt from tax, the objective of the Treasury and of the Congress was achieved. This provision became Section 754(b) of 31 U. S. C.

It is clear, therefore, that to the Congress and to the Treasury absent special legislation issue discount when realized on a sale resulted in a capital gain and not interest. When Congress desired to separate issue discount from other profit and to classify the issue discount as "interest" because of its relationship to the use of money, it was fully aware of the avenues open to it and of its ability to prescribe the desired tax results by classifying the issue discount as interest as it did in 1929. For reasons best known to Congress it did not see fit prior to 1954 to characterize all issue discount as other than capital gain.

2. There is nothing in the 1938 report of a Subcommittee of the Committee on Ways and Means to support the Government's contention that the statement in the report that discount when realized on sale produces a capital gain referred only to "market discount" (Br. 13). In fact, the report (Pet. Br. pp. 15-16) demonstrates the contrary.

If Congress had in mind only market discount (as the Government claims, though this is nowhere to be seen), there would have been no need for the Committee to have

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[20] Senator Couzens (32a):

"It leaves out all reference to capital gains, so that if a security sold by the United States is held to maturity, the gain is considered as interest, and is, therefore, under the law, tax exempt, but if there is any transaction in the particular note or security afterwards in which the interest rate changes, or in which there is a gain, that gain is taxable under the existing law. To offset that, we had to eliminate from the bill reference to the deduction of losses."

stated that "the complete exemption of capital gains from income taxes might well stimulate the conversion of other types of income into the form of capital gains."[21] If the intention ever existed in connection with a debt obligation to convert what might have otherwise been ordinary income into capital gain that intention could exist only at the time when the obligation was issued. Once issued, its terms could not be varied to create discount and the "conversion of other types of income into the form of capital gains" to which the proposed exemption from tax would apply.

3. The Government's discussion of Sections 201(e) and 207(d) admits that these sections are examples of specific legislation which characterizes discount as income, which enactments should have been superfluous if the general rule was, as contended by the Government, that issue discount always was income under the 1939 code.

Section 201(e) and Section 207(d) were added by the Revenue Act of 1942. Legislative history shows that as enacted by the House of Representatives they pertained only to bond premium and that the purpose thereof was to provide for insurance companies the right to amortize bond premium in the same manner as other holders of debt obligations who were then being permitted to amortize premium under Section 125, also added to the 1939 Code by the 1942 Revenue Act.[22]

The Senate broadened the scope of the provision by adding the requirement for accrual of discount as well; since premium was being allowed by statute as an offset to income, discount was being required by statute to be an increase to income.[23]

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[21] Report of Subcommittee of Committee on Ways and Means, 75th Cong. 3rd Sess. Dated Jan. 14, 1938. Reported in Hearings on H. R. 9682, 75th Cong. 3rd Sess., p. 38.

[22] H. Rep. No. 2333, 77th Cong., 2d Sess., p. 111.

[23] S. Rep. No. 1631, 77th Cong., 2d Sess., p. 147.

Thus Congress again demonstrated its awareness of discount and the need for specific legislation to make of it an income item *as well as the relationship between premium and discount.* However, although the Senate apparently believed that both premium and discount should in certain circumstances be placed on the same basis, it acted only with respect to certain insurance companies and not all taxpayers.

4. As was true of the Court below, the Government has not reconciled, because it could not, the adjudicated status of debt premium with its present position as regards debt discount. The Government would ignore the identity between premium and discount on the alleged ground that discount and premium have been distinguished for purposes of the issuer's accounting and ought therefore be distinguishable for the purposes of holder's accounting (Br. 16). None of the cases cited nor any of the materials brought forward support this distinction.[24]

Except where there were constitutional considerations because the premium was received prior to March 1, 1913, as in *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, the Courts have given the same effect in the computation of the taxable income of the issuer to debt premium as they have to debt discount.[25] On an amortized basis the premium serves to increase the issuer's taxable income, whereas the discount serves to decrease taxable income. As regards the

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[24] Even Government rulings are to the contrary. G. C. M. 1455, 1927-1 Cum. Bull. 87, 88 ruled that "the treatment of premium is analagous to that of discount and therefore the Bureau rulings on the treatment of discount are in point." See also O. D. 475, 2 Cum. Bull. 211 (1920) which besides recognizing the correlation between discount and premium as regards the issuer and the amortization which was then required for both, states that such amortization "is not permissible in the case of the purchaser of bonds."

[25] The Government has agreed (Br. 15).

holder, this Court[26] and the Treasury have held that premium (even though effective to increase the issuer's taxable income) does not reduce the holder's taxable income unless there is special legislation.[27]

The principles applicable to a holder at a premium should be equally applicable to a holder at a discount. So long as in the absence of special legislation premium affects only capital gain or loss, so too can discount affect only capital gain or loss.

The Government does recognize that in *Old Colony R. Co.* this Court rejected the "effective interest approach." The Government's apparent reservations about "the merits of that ruling" (Br. 16) are beside the point.[28] The fact is that as regards premium, this Court (as well as the Government) has thus ruled that determination of taxable income is not controlled by business or economic concepts of what constitutes "compensation for the use of money." Such concepts are equally inconclusive when the tax question involves issue discount.

Legislative history shows that in 1942 express legislation was adopted to make of premium an income item to the holder by providing that he need only report the effec-

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[26] *New York Life Insurance Co.* v. *Edwards*, 271 U. S. 109. Contrary to the Government's contention (Br. 14), the record in that case does not in any way disclose that only bonds purchased at a market premium were involved.

[27] 4 Mertens, Law of Federal Income Taxation, Sec. 23.162, p. 296.

[28] In *Lubin* v. *Commissioner*, 335 F. 2d 209 (2d Cir. 1964), the Second Circuit refused to accept the contention that the gain realized on retirement of certain registered instruments was under the facts of that case taxable as interest and not as capital gain and rejected the Government's effective interest rate argument on the authority of *Old Colony R. Co.*

tive net yield as income from an obligation.[29] In 1954 Congress enacted Section 1232 and likewise made of issue discount an item of income by providing that when realized it is to be taxed as gain from the sale or exchange of a non-capital asset. However, the changed statute as regards discount was not in effect in 1952 since Section 1232 of the 1954 Code is expressly applicable only to debt obligations issued after December 31, 1954.[30]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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[29] Section 125 which permitted premium amortization was added to the 1939 Code by the Revenue Bill of 1942. The Report of the House Ways and Means Committee states: "Under existing law, bond premium is treated as capital loss sustained by the owner of the bond at the time of disposition or maturity and periodical payments on the bond at the nominal or coupon rate are treated in full as interest. The want of statutory recognition of the sound accounting practice of amortizing premium leads to incorrect tax results which in many instances are so serious that provision should be made for their avoidance." H. Rep. No. 2333, 77th Cong., 2d Sess., p. 47.

[30] So far as can be ascertained, the Treasury did not prior to 1954 ask Congress to change the tax status of *all* issue discount. Under such circumstances, there is even more pertinence in the admonition of this Court in *Hanover Bank* v. *Commissioner*, 369 U. S. 672 at 682, that arguments which might have brought about a change in the statute cannot be the basis for supporting a Government interpretation of the existing statute which is not consistent with the meaning of the words used by Congress in the light of legislative history.